In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 403

JACK FREDERICK MCKART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-24) is reported at 395 F. 2d 906.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1968. Mr. Justice White extended the time for filing a petition for a writ of certiorari to August 13, 1968, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, who failed to exhaust his administrative remedies, may defend against a criminal prosecution for failure to submit to induction on the ground that he was wrongfully classified I-A in violation of the Selective Service Act.

STATEMENT

After a jury-waived trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of willfully and knowingly failing to report for and submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462. On June 22, 1967, petitioner was sentenced to imprisonment for a period of three years. A divided panel of the court of appeals affirmed his conviction.

The facts of the case, which are summarized in both the opinion of the court of appeals (Pet. App. 17-19) and the memorandum decision of the district court (Pet. App. 24-27), are not in dispute.

Petitioner, who was born on February 13, 1943, registered with his local Selective Service board on or about his eighteenth birthday, and shortly thereafter he completed and filed his classification questionnaire (S.S. File 2-6).[1] He was classified I-A by his local

[1] Record references are to petitioner's Selective Service file, which we are lodging with the Clerk of the Court.

board on February 25, 1963, and was notified of this classification on February 26, 1963 (S.S. File 9). Petitioner made no attempt to appeal his classification. On March 23, 1964, he was ordered to report for a pre-induction physical on April 21, 1964 (S.S. File 9, 12), but failed to do so (S.S. File 9, 13). On May 1, 1964, petitioner was ordered to report for induction on May 11, 1964 (S.S. File 9, 14), but once again failed to report as ordered (S.S. File 9).

Instead, on May 10, 1964, petitioner wrote a letter to his draft board stating that he refused to report for induction. The reasons which he set forth in this letter were that he did not believe in killing, that the Selective Service System violated his beliefs, and that he therefore refused to have anything to do with it. He also objected to conscription as slavery. He stated categorically, "I refuse to serve this country armed, and I refuse to serve it unarmed by doing alternative service" (Pet. App. 18).

The draft board replied by furnishing petitioner the form to fill out if he desired to claim conscientious objector status and suggesting that he complete the form and return it. The board also stated in its letter that petitioner had indicated in his original questionnaire that he was the sole surviving son of a family of which one or more members had been killed in action (S.S. File 17), and requested further information on this subject.

On May 20, 1964, petitioner returned the blank form to the board stating that he did "not wish to become classified as a conscientious objector." He reiterated his previous position, saying that "I simply

no longer want to have anything to do with the Selective Service System." At the conclusion of this letter he stated (Pet. App. 18):

> If I indicated that I was a "Sole Surviving Son" when I filled out your forms around my 18th birthday, then I made a mistake. I do not even have any brothers or sisters. But my father was killed in the second world war. I do not have the specific information you ask for. [S.S. File 18-19.]

Even though petitioner did nothing to claim an exemption as a sole surviving son (50 U.S.C. App. 456 (o)), the draft board on its own initiative cancelled his induction order and classified him IV-A (S.S. File 9, 29). From July 27, 1964, until February 14, 1966, petitioner remained in the IV-A classification.

Early in 1966, the local board learned of the death of petitioner's mother (Pet. App. 19). His classification was then changed from IV-A to I-A (S.S. File 9). Petitioner was subsequently ordered to report for a physical examination on March 17, 1966, and for induction on April 21, 1966 (S.S. File 9, 32, 36). He failed to comply with either of these orders (S.S. File 33, 37, 51). His criminal prosecution for violation of 50 U.S.C. App. 462 resulted.

ARGUMENT

Both courts below properly concluded that petitioner's complete failure to exhaust his administrative remedies precluded him from asserting the defense that his reclassification as I-A was erroneous as a matter of law.

It has long been established that a registrant who claims to be improperly classified is under an obligation to exhaust his administrative remedies by appeal before asserting the alleged error in his classification as a defense to criminal prosecution. *Falbo* v. *United States*, 320 U.S. 549; *Estep* v. *United States*, 327 U.S. 114, 123. That principle is in accord with the general rule requiring the exhaustion of administrative remedies before agency action can be questioned in court. *E.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-52; *Kidd* v. *United States*, 386 F. 2d 422, 423 (C.A. 10); *Dunn* v. *United States*, 383 F. 2d 357 (C.A. 1), certiorari denied, 390 U.S. 982; *Noland* v. *United States*, 380 F. 2d 1016, 1017 (C.A. 10), certiorari denied, 389 U.S. 945; *Thompson* v. *United States*, 380 F. 2d 86, 88-89 (C.A. 10); *Capson* v. *United States*, 376 F. 2d 814 (C.A. 10), certiorari denied, 389 U.S. 901.

It may be assumed that the rule here involved is subject to exceptions recognized in administrative law generally—*e.g.*, that exhaustion of administrative remedies may be unnecessary where an appeal would clearly be to no avail[2] or where a person has been effectively prevented from taking an appeal.[3] But this

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[2] See *Glover* v. *United States*, 286 F. 2d 84 (C.A. 8), where the appellant had taken an administrative appeal from a prior classification notice and lost, but failed to appeal from the fifth and final notice of classification. The court excused this "procedural irregularity."

[3] In this regard, petitioner's reliance on *Wills* v. *United States*, 384 F. 2d 943 (C.A. 9), certiorari denied, 392 U.S. 908, is misplaced. There the court of appeals found that the local board did not mail the registrant his notice of delin-

is not such a case. Petitioner was not in any respect prevented from taking an appeal. Nor is it clear that an appeal would have been to no avail. While petitioner's reclassification after his mother's death was made after his local board had consulted with state Selective Service officials, this hardly amounted to formal consideration on appeal. Petitioner recognizes that the proper interpretation of the sole surviving son exemption contained in 50 U.S.C. App. 456(o) is a question of first impression. Thus, this is not a situation where, because of a settled interpretation or approach by the Selective Service System, it could be said that nothing might conceivably be gained by an administrative appeal. Moreover, if petitioner had appealed his reclassification, his appeal might have reached the National Selective Service Appeal Board appointed by the President, which exercises the powers bestowed upon the Chief Executive by 50 U.S.C. App. 460 (b)(3), independent of the Director of Selective Service (32 C.F.R. 1604.6(c)). In addition, there might have been factual circumstances which warranted reconsideration of petitioner's right to a statutory exemption.[4]

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quency until long after the expiration of the period for appeal from his reclassification. The court found that this error by the local board excused petitioner's failure to exhaust administrative remedies.

[4] Our examination of petitioner's Selective Service file discloses that the obituary in the local newspaper which reported the death of petitioner's mother stated that his maternal grandparents were alive at the time of his mother's death (S.S. File 31). The implications of this fact were never brought to the attention of the local board. Since petitioner

We recognize that petitioner claims an absolute statutory exemption and not a deferment conditioned upon the survival of a member of his "family." On that premise, he might have been entitled to pre-induction judicial review of his classification (see Brief for the United States in *Oestereich* v. *United States*, No. 46, this Term). But the nature of the exemption he seeks did not relieve petitioner of the obligation to exhaust administrative appeals.[5] At whatever stage the courts may properly entertain the kind of claim asserted here, it can only be after other available remedies have been pursued. There is no occasion to waive that rule in this case, since—although on narrower grounds than those he urges—effective relief might have been available to petitioner in further administrative proceedings (see note 4, *supra*).

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refused to contact his local board, we do not know whether they were still living at the time he was reclassified I-A. Nor do we know whether his paternal grandparents were alive at that time. We cannot know whether presentation of existing facts as to petitioner's family would have affected his classification.

[5] For this reason, there is no occasion to consider the alternative ground relied on by the courts below, petitioner's failure to appear for physical examination and report for induction.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
LEONARD H. DICKSTEIN,
Attorneys.

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